

March 1, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
SHIELDALLOY METALLURGICAL CORP.)	Docket No. 40-7102
)	
Material Decommissioning Plan)	

NRC STAFF'S MOTION FOR LEAVE TO
RESPOND TO NJDEP'S REPLY BRIEFS

INTRODUCTION

The NRC Staff (Staff) requests leave to respond to the reply briefs filed by the New Jersey Department of Environmental Protection (NJDEP) on February 27, 2007.¹ The Staff makes this request because in its reply briefs NJDEP improperly seeks to supplement its Petition for a Hearing by providing new bases for certain contentions and by citing additional legal or factual support for its contentions. If the Board grants this motion, the Staff will file a response limited to those portions of NJDEP's answers that exceed the scope of a proper reply. The Staff will explain why those portions of NJDEP's replies should not be considered by the Board in ruling on NJDEP's contentions. The Staff will also explain, as appropriate, why even if the improperly proffered material is considered it should not result in the admission of additional

¹ As required by 10 C.F.R. § 2.323(b), counsel for the Staff has contacted NJDEP's attorney prior to filing this motion. Counsel for NJDEP stated that although he cannot object to the Staff filing a motion, NJDEP will defer stating whether the relief the Staff requests is appropriate until it reviews the substance of any filing.

contentions. In compliance with 10 C.F.R. § 2.323(e),² the Staff will file its motion no later than March 12, 2007.³

BACKGROUND

On January 16, 2007, NJDEP filed a petition for a hearing on the decommissioning plan (DP) submitted by Shieldalloy Metallurgical Corporation (SMC), an NRC licensee.⁴ NJDEP's petition contains 17 contentions. The Staff filed its response to NJDEP's petition on February 12, 2007, opposing nine of NJDEP's 17 contentions but not opposing certain portions of the remaining eight contentions.⁵ SMC also filed an answer on February 12, 2007, opposing all of NJDEP's contentions.⁶ On February 27, 2007, NJDEP filed separate replies to both the Staff's response and SMC's answer. In its replies, NJDEP impermissibly seeks to provide new bases for its contentions and provide new legal or factual arguments for those contentions.

DISCUSSION

It is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223 (2004), *reconsideration denied*, CLI-04-35, 60 NRC 619 (2004). "Replies must focus narrowly on the legal or factual arguments

² The Staff is aware that, under 10 C.F.R. § 2.309(h)(3), "[n]o other written answers or replies will be entertained" after a petitioner files its reply. However, because NJDEP's most recent filing goes beyond the limits of an appropriate reply under § 2.309(h)(2), the Staff considers it necessary to respond to NJDEP's reply.

³ NJDEP served the Staff with its Reply via an e-mail that the Staff received at 5:22 p.m. on February 27, 2007. Because the Staff was not served until after 5 p.m., the 10-day period for filing a motion in response to NJDEP's Reply did not begin to run until March 1, 2007. 10 C.F.R. § 2.306.

⁴ "Petition for a Hearing on the Shieldalloy Metallurgical Corp. Decommissioning Plan" (Jan. 16, 2007) (ADAMS ML070290433) ("Petition").

⁵ "NRC Staff's Response to Request for a Hearing by the New Jersey Department of Environmental Protection" (February 12, 2007) (ADAMS ML0704602400).

⁶ "Shieldalloy's Answer to Petition for Hearing of the New Jersey Department of Environmental Protection" (February 12, 2007) (ADAMS ML0704703510).

first presented in the original petition or raised in the answers to it. New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. §§ 2.309(c), (f)(2)."

Nuclear Management Co., L.L.C. (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006). See also 9 James Wm. Moore, Moore's Federal Practice ¶ 228.02 (1995) ("The case law is to the effect that the appellant cannot raise new issues in a reply brief. . . .").

In its reply briefs, NJDEP seeks to expand the scope of the arguments and contentions in its initial petition for a hearing. NJDEP does this in certain instances by raising new bases for its contentions. For example, whereas NJDEP initially claimed in Contention 4 that SMC was required to support its DP with a final status survey (Petition at pp. 22–27), NJDEP now argues SMC did not "sufficiently characteriz[e]" its site for purposes of DP review (Reply to Staff at pp. 6–7). NJDEP also seeks to provide additional factual or legal support for certain contentions, as evidenced by the aerial photograph NJDEP has submitted in support of Contentions 5, 9 and 10 and the economics article submitted in support of Contention 8 (Reply to Staff, Attachments A and B).

Accordingly, the Staff requests leave to respond to these and other instances where NJDEP seeks to either improperly expand the scope of the contentions set forth in its petition or supplement those contentions with new legal or factual arguments. In its response, the Staff will explain why the Board should rule on NJDEP's contentions without considering these new issues or arguments. The Staff will also explain why, even if the Board considers this newly submitted information, the Board should not use that information to admit contentions or expand the scope of any contention.

CONCLUSION

Because NJDEP's February 27, 2007 reply briefs seek to expand the scope of NJDEP's Petition for a Hearing, and because the replies seek to introduce new factual and legal arguments, the Staff requests that the Board grant leave so that the Staff can respond to NJDEP's reply briefs.

Respectfully Submitted,

/RA by Michael J. Clark/

Michael J. Clark
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 1st day of March, 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION FOR LEAVE TO RESPOND TO NJDEP'S REPLY BRIEF" in the above captioned proceeding have been served on the following persons by deposit in the United States Mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk(*); and by electronic mail as indicated by a double asterisk (**) on this 1st day of March, 2007.

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